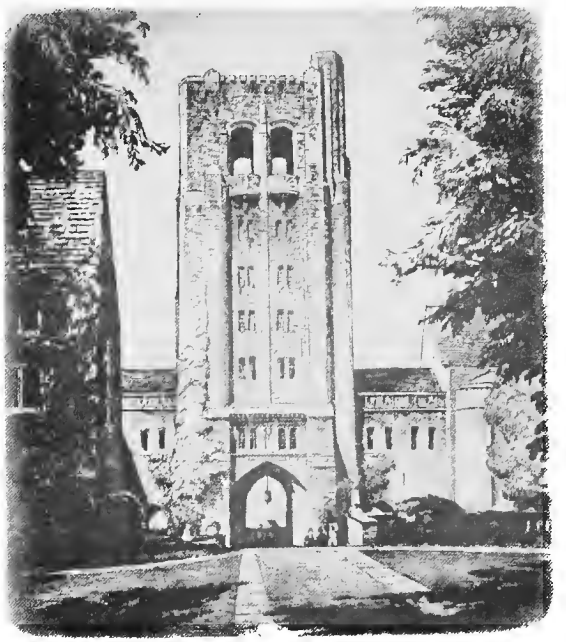
BOWMAN

LEGAL SUGGESTIONS RESPECTING ROAD CONTRACTS.



LEGAL SUGGESTIONS RESPECTING ROAD CONTRACTS.

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Read at American Road Congress, held at Detroit, Mich., Sept. 29 to Oct. 4, 1913.

Etymologically and technically the word "contract" should mean an agreement enforcible by law. "The Law of Contract may be described as an endeavor of the State * * * to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness." How do our present public contracts for road construction and their interpretation by officials satisfy these old definitions. As a part of the great work of properly linking our states and their cities and towns with uniformly good roads, it is incumbent upon us to better and if possible make uniform the contract conditions respecting the construction work and to secure that co-operation and esprit-de-corps between officials, engineers and contractors which alone will give us the best roads for the least money with a minimum of trouble and wasted energy. It has been wisely remarked that "you get only what you pay for" and in the long run that is as true in road construction work as in any other field.

Let us first consider some general principles respecting states, municipalities and roads which should be known in order to appreciate the special subjects which will be considered.

The state is a sovereign body and as such is not responsible by action at law or in equity. There are a few isolated cases holding that when a state goes outside its governmental capacity, it may then be sued in the Federal Court. No dependence however can be placed upon these decisions by a contractor. The result is that a contractor with a state has no way to enforce his contract rights nor to secure redress against official oppression unless the state legislature has provided therefor. The best and usual plan is the formation by the legislature of a court or board of claims to hear and determine claims against the state, its departments and boards. One state allows a contractor to sue it provided the legislature passes a special bill for the specific matter. The value of that right is well illustrated by a statement made to the writer by an offending official that when he got thorugh with the matter I would have to have more political influence than he thought I had in order to get such a bill through

the legislature. It is also the general rule that in such instances the offending official himself is beyond the legal reach of the contractor. Thus it is that except in those states having a court or board of claims, official oppression and even financial ruin can be honestly or dishonestly caused without any hope or prevention or redress for the contractor. A so-called agreement where the contractor depends solely upon the action of an official and his engineer should not be called a contract. It violates the true meaning and our understanding of that term. This inability of a contractor to enforce his contract rights or even to demand fair play and justice cannot but be detrimental to good economical road construction. Under such circumstances the work becomes political—only favorites dare bid or accept contracts—and the other results of political work naturally follow.

Due to this fact that most states could not and still cannot be compelled to live up to their contract conditions, the terms of a state contract have been considered practically unimportant by the contractor. He knew that he must follow the direction the plans and specifications called for. While conscientious and honest officials and engineers predominate in state work yet they at times need the restraint which a chance to be heard by the contractor affords. Furthermore the atmosphere and the mental attitude of all concerned is bad in such a situation. Those opposed to granting the contractor this right to properly and legally present his claims before a disinterested court or party will be interested to know that even so great a sovereign as Emperor William of Germany last year lost an action to one of his tenants in the German Supreme Court over the value of certain improvements. Therefore unless a state has a board or court of claims open at all times to those contracting with the state, its departments and boards, or unless it provides for a submission to an impartial and disinterested arbitrator or arbitrators any changes in the present state contracts that are discussed or suggested will of course be useless except as they may influence the controlling official. In this connection it has been very noticeable that both the judges and the juries favor the state or municipality when they are sued. This is even found where it is necessary to construe the iron-clad terms and conditions of our present day one-sided agreements which are required to be signed by those desiring to engage in public work and where it would be expected there would be some sympathy for the contractor. In all seriousness then, it is submitted that there seems to be no logical reason why the contractor should not be given an opportunity to get a square deal if he believes he is not being fairly or honestly dealt with.

Municipalities are the legal creatures of the legislature, and their powers and rights must be found in the law creating them.

Throughout this paper the term municipalities will signify cities, counties, towns, boroughs, road districts, etc. As a governmental agent, a municipality is immune in respect to mere errors of judgment but in its ministerial capacity it is liable for consequences of negligence and maladministration. As regards plans for public improvements some courts attribute negligence to a municipality in the adoption of a defective plan and the test of the liability of a municipality which causes injury is not the fitness of the engineer but the efficiency of the work. Where a defective plan is the result of bad faith or oppression or is so clearly unreasonable as to inflict needless injury a court may enjoin performance or if the work is completed hold the municipality responsible.

Roads are in the control of the state. In doing road work a municipality acts as the agent of the state performing a public duty imposed by law. On this account those dealing with either roads or municipalities must ascertain the legislative acts pertaining thereto as a basis for any serious investigation. In determining the powers or rights conferred by such statutes the investigator must remember that the wording of the law will be strictly adhered to and that the tendency is to restrict powers granted and to deny any implied powers or rights.

Since a contract may be either wholly void or voidable at the option of the state or municipality unless certain preliminary steps are properly taken and since in such instances it usually results in a total or partial loss to the contractor of his compensation for work done and material furnished it is essential that a brief warning in this regard should be given.

With respect to roads; the proceedings to acquire the land; the report upon the advisability of a road; the estimate of the cost; the description of the road; the survey and resurvey; the proper sanction of the voters or taxpayers; the proper formation and action of the boards or courts, etc., all must be in compliance with the statutes and laws pertaining thereto. In addition the actual preliminaries to the contract itself must be regularly and legally complied with:—A proper and sufficient appropriation or available funds; a proper advertisement for bidders; a proper letting to a proper party; a properly constituted board or official acting strictly in accordance with its or his authority; a proper bond for performance, etc. The contract itself must be in the required form properly executed, for the purposes allowed by the special statute, with proper persons entitled both to give and to have such contract and in accordance and in conformity with the preliminary reports, plans, specifications, survey, description, etc. As has been previously stated, failures, omissions, or negligence on the part of any of the state or municipal officials or agents in the above respects may cause the contractor to lose his

compensation for work done and for benefits actually conferred by the contractor. There are some decisions and some statutes which are based on equity to prevent such unjust enrichment of such bodies at the expense of a contractor but it is not safe to rely on such law in any particular instance. The general rule may be likened to the ancient rule of "caveat emptor" or as it might be expressed here "let the contractor beware." This warning, while primarily for the contractor should be taken to heart by the official who is trying to do right and be honest since usually he is the unfortunate party that causes the contractor's troubles and losses.

CONTRACTS.

As we have already seen, most present day state contracts for road construction are not really "contracts" because of the inability of the contractor to sue thereon. In addition I have also seen one state contract which stated that "all right or rights of any action at law or in equity under or by virtue of this contract and all matter connected with it and relative to the same are hereby expressly waived by the contractor." Practically the same result is accomplished by other states and especially by municipalities by the requirement that upon or before final payment the contractor must execute a release in full of all claims arising out of or by reason of the work done and material furnished under the contracts. Is this *good* faith in the dealings of men of average right-mindedness? I cannot conceive of but one answer to this question. The remedy then is simple. Provide either fair and disinterested boards of arbitration to pass upon a contractor's claims or provide a court of claims and eliminate any waiver of appeal to such arbitrators or court and the general release as a condition precedent to final payment from all road construction contracts. In other words give the contractor a chance for a square deal upon a two-sided mutually agreeable contract. In passing it might be noted that the United States Government is probably the worst offender in this matter of unfair and objectionable clauses, including that requiring a release, and it is setting a disgraceful example for the states and municipalities.

SATISFACTION CLAUSES.

It is probably a safe statement that there is no state or municipal contract in use today which does not provide for the "satisfaction" of some official, board or engineer or all combined. Is this a necessary, fair and honest requirement in road construction contracts or is it merely a club to compel the contractor to do what the official or engineer wants regardless of the plans and specifications?

In most states it has been properly held that this requirement merely necessitates work satisfactory to the mind of a reasonable man. Thus if the work has been performed substantially in compliance with the contract, the law will hold the official, engineer, etc., to be satisfied. With plans and specifications so clear and concise as they generally are in road construction, and especially with the work required to be done "under the direction" of an engineer and under constant inspection, it would seem that legal satisfaction would be presumed in 99 out of 100 cases and hence the use made of this requirement in such states would be merely to bluff or bulldoze the contractor. In no way does it improve the requirements of the plans and specifications.

In such a state as Pennsylvania where work can be held unsatisfactory by the official or engineer even though the plans and specifications are rigidly adhered to and where only honesty of purpose is required, the result of such a contract requirement may be heartbreaking. Under the guise of dissatisfaction I have known an official in that state to deliberately violate every essential provision of an agreement and to settle at his own figure with the contractor; or in plain English to rob the contractor not only of his contract right but also of thousands in money with no redress. A contractor who accepts state work in a state where this personal satisfaction of private taste in road construction is required must understand that he is at the beck and call of the official or engineer regardless of his contract requirements and conditions. What could the contractor in such a state do when he has to satisfy not only the engineer in charge, but the Road Commission and a state board? Suppose the work satisfied one and not the other two, or two and not the third party?

Our considerations recommend that "satisfactory" requirements be dropped from road construction contracts as either unnecessary, harmful or unfair and as not being a sanction for the expectation of good faith between men of average right-mindedness.

CONTRACT WORK.

In looking over many of the latest forms of road construction contracts it is noticeable that there is a very decided improvement in the manner and method of setting forth the contract work and specifying what is variously designated as alteration, additional, miscellaneous, or extra work, etc. Road work is now generally specified in various units and a price bid for each respective unit. In one such contract we find this definition: "Extra work is any work in connection with the execution or completion of the contract for which no price is included in the proposal sheets and contracts." Compare this simple and concise statement with a New York City form which had different

requirements for ordering additional work as differentiated from extra work, the distinction not being stated and being such that there would be times when the average engineer or contractor would not know to which class the work belonged to. Result—the contractor would be refused payment for additional work done pursuant to extra work requirements or vice versa.

In this same regard why should a contractor, as is now frequently demanded, be responsible for unknown or underground conditions? Just lately in New York City a paving contractor found a lot of rock above grade which should have been taken out by a prior grading contractor. Under notice to bidders to examine the site, etc., the Court of Appeals held that the plans of the completed grading contract on file in the city offices did not constitute a representation to bidders of the condition of the road bed and hence the paving contractor had to do this work of grading without extra compensation.

Let us then have definite contract units of work at unit payments clearly specified, and provide payment for any other work necessary which may arise either at the unit prices or, as is becoming popular, upon a percentage basis. This latter method seems a fair means of providing for extra work as hereinbefore defined but the contract must specify exactly what is to be considered the "cost" upon which the percentage is based, as there is great difference of opinion on the subject. For example in one state, the statute provides for certain construction work at cost plus 15%. There being no provision against subletting, the actual work was done by subcontractors at a fixed price. The "cost," as sustained by the highest court, included the cost to the contractor for the work as agreed and paid to the subcontractor, the contractor's overhead expenses for supervision, engineering, office rent, etc. In this way the state actually paid 53 1-3% on the actual cost of labor and materials at the job which is the popular conception of the word "cost" in percentage contracts. The rules of law applicable to percentage contracts are the same as those to the ordinary lump sum contracts. Under proper contract conditions with definite plans and specifications and with honest officials and contractors, contracts on the percentage basis of "cost of labor and materials at the job" would in my opinion give as wide scope for competitive bidding and should give better results in actual construction work. It should do away with many of the conflicts now common between the official, the engineer or both and the contractor. The tendency would also be to give closer competition between the large corporation with heavy overhead charges and the small concern with practically no such expenses. There would seem to be no question but what in the long run this would be less expensive to the municipality because it would tend to cut out the contracts with enormous

profits and at the same time lessen the broken contracts because no contract should be given out for less than the defined "cost" price. This is merely a suggestion in passing but I should like to see it given a fair trial.

DUTIES OF THE ENGINEER.

Under most of our road construction contracts the engineer takes his time honored dual capacity of agent for the state or municipality and arbitrator between the contracting parties. It has been noted that if the contract provides that the engineer will make an estimate and issue a certificate he will often do so where he may refuse if such wording is not used. There is no question but what the engineer is given too much "discretion" under our present contracts. In road construction work there would seem to be no excuse for a lack of definite plans and specifications which of themselves should reduce the engineer's discretion to a minimum.

There always will be objections to the salaried or paid engineer of a state or municipality acting as an arbitrator without appeal as is the result accomplished by practically all state and municipal contracts. Upon the wording of such contracts some courts have even gone to the extent of holding the contractor but not the state or municipality bound by the engineer's decisions within the scope of his authority. Clearly such a result is unjust. In addition to this, state and municipal contracts are so replete with oppressive or "club" clauses for the engineer that a contractor knows he must take care of that official one way or another. It has been well said that no man should be placed in such a position where bribery and graft is often the easiest and cheapest solution of differences or disputes. Whether or not the engineer is an arbitrator depends upon the strict wording of the pertinent clauses of the contract. All such clauses will be strictly considered and no implied powers will be given the engineer. Where an engineer is made an arbitrator he must remember that he has greater powers than the judges on the bench, because he may intentionally decide contrary to the law and still have his judgment stand. On this account an engineer's decisions should be beyond reproach. The fact that in the exercise of his duties as arbitrator he cannot be held legally responsible for lack of skill, carelessness and even negligence should create an ambition to merit the honor bestowed. The engineer should never forget that he is, under present day clauses, taking the place of the court and that his action may close the door to either party to appeal from his decision. Professional honor and reputation often depends more upon the engineer's action in such matters than upon his pure engineering knowledge. However, the engineer must know that

he cannot ordinarily deprive the contractor of his right to judicial construction of the contract after it has been performed so far as such construction involves matters of law. These considerations show us that the engineer holds under our present day construction contracts an almost impossible position for a human being. Would it not be better to relieve him of some of these onerous duties? Experience seems to show that better feeling, better work, and co-operation between the engineer and contractor may be secured by more precise, concise and definite plans and specifications, and the elimination of all unnecessary "discretion" and "arbitration without appeal" clauses respecting the engineer.

CONSTRUCTION OF CONTRACTS.

Since we cannot expect any sudden change in present road construction contracts, this paper would not be complete without a statement of some of the most general legal principles which should govern the actions of officials and engineers even if the contractor cannot sue or get a fair hearing for his side. Since all state and municipal contracts emanate from the contracting official the ordinary rule is that the contract provisions should be construed most strongly against the author. Especially is that so when such construction is necessary to save a contractor from fraud and injustice, or where, as in these contracts, one party is at the mercy of the other. The following instances where municipalities have been held responsible in damages on account of the actions and orders of officials and engineers should be known and avoided:

(a) Mistakes in lines, grades, elevations, plans or specifications or directions whereby the contractor had either to do additional work or do over work already done.

(b) Requirement that the contractor do the work in a way not called for by the contract, entailing more expensive work than would customarily or otherwise be entailed.

(c) Requirement that the contractor do over work already done properly or repair or maintain the same unreasonably.

(d) Requirement that the contractor do work not within his contract as contract work.

(e) Refusal to permit contractor to perform work called for by his contract.

A substantial performance of a contract creates a situation where the contractor is entitled to his full contract price less the expense of supplying the omissions and defects. From a study of cases all over the country the following rule would seem practical for contracts under $25,000. Provided the contractor has honestly attempted to complete his contract, and

particularly when he has followed the directions of the official or engineer, and when the omissions or defects do not pervade the whole work or make the object of the parties impossible or difficult of accomplishment, or when the usefulness or value of the construction is not materially impaired, and provided the cost or reasonable value of correcting such defects or omissions does not exceed 6% of the contract price, then there has been a substantial performance. No practical working rule can be given for contracts over $25.000. Substantial performance also excuses the production of an engineer's certificate.

In this connection it is important to note that in correcting defects, supplying omissions or completing a contract the state or municipality becomes bound by the terms of the contract and its plans and specifications. For example, if the contract permitted the use of native stone the state cannot use trap rock and expect to charge that against the contractor. In such instances a burden is imposed upon the official to complete the performance in good faith pursuant to all the contract provisions and with reasonable care and regard to the rights of the contractor. There seems to be a tendency on the part of some officials to make an example of a contractor who has defaulted. Their chief object often seems to be to spend all the retains and if possible all they think they can collect on the contractor's bond. This is neither legal nor honest. The completion work must be done diligently, and the damages mitigated as much as possible. High priced men cannot be used for cheap labor, nor can completion be delayed until market prices have risen. Thus it has even been held that a municipality was bound by the date of completion when it assumed a contract.

If a contract calls for liquidated damages for delay after a specified date, such damages are waived or are not recoverable by the state or municipality where they render the contract incapable of performance within the specified time or where they assume as agents of the contractor to complete the contract. Similarly if the delay after a specified date is caused, both by the state or municipality and the contractor, the liquidated damages cannot be apportioned. It has been held that a city cannot retain a substantial sum under the guise of liquidated damages for delay when in fact only nominal damages have been sustained. Where the liquidated damage clause falls, then actual damages caused by the contractor must be proved as an offset. There is still one very important matter pertinent in this respect. Where a contractor follows detailed plans and specifications and the directions of the engineer and completes any part or all the work there should be no deductions for variations from the contract since the parties have practically construed the contract as one for work in accordance with the engineer's directions and

such construction must prevail over the literal meaning of the contract. Also under these same conditions and circumstances a contractor is not responsible for a result nor is he responsible for any defects or repairs (except where there is a repair clause) beyond those required by the failure of the contractor's materials or by the contractor's own work. In other words, a road contractor usually does not warrant the road as capable of standing any particular traffic, etc., that should be determined by the plans and specifications.

Naturally the most important thing to the contractor is prompt payment, not only of his partial but also of his final payment. It is a general rule of law that a failure of a state or municipality to pay an instalment on the due date causes a breach of contract which relieves the contractor from further performance and enables him to collect the contract price or reasonable value of all work done to date. The failure of the engineer to make his estimate and issue his certificate may not excuse a failure to pay partial payments even if they are required to be made only upon engineer's certificates. The refusal of an engineer, under ordinary circumstances where there has been work done, to make his estimate and issue his certificate in time so that the contract payment can be made is of itself presumptively fraudulent. Again it is often found to be the case that the engineer refuses to act upon the direction of the official, which, of course, is collusion, and which excuses the production of such certificate. It is a rule of law that an engineer's certificate will not be considered as a condition precedent to a partial or final payment unless it is definitely and distinctly stated so to be in the contract. The control of the money bag is often supreme and in this way engineers and officials have it in their power to make or break a contractor. A reputation of an engineer for prompt and fair estimates and of an official for prompt payments is sure to result in lower bids and better construction work.

Having considered these few most important matters and with an understanding of the legal principles involved cannot we in the future have justice and equity and not vengeance, spite or bossism in road construction work? The result of such a change, where it is necessary, cannot but be beneficial to all concerned.

REPAIRS.

There seems to be a tendency in some of the present day road contracts to require a contractor to maintain the road for a specified length of time, usually one to five years. Is that a good and economical requirement? Does it not to a certain extent restrict bidding and contracting to local parties? Are not the

unit prices and hence the contract total largely increased to take care of an unknown amount of repairs? Is there not a gamble on that matter? The best of roads require constant inspection and repairing to keep them in shape. That work should be done either under a strictly repair contract or by the state or municipality itself. This criticism of course is more applicable to country roads as differentiated from city streets.

SUMMARY.

In a late article of mine advising architects respecting employment by state or municipalities the following rules were formulated which would seem pertinent here:

(1) Know that the municipal corporation is acting pursuant to the law creating it.

(2) Know that your contract does not cause the indebtedness of the municipality to exceed its constitutional or statutory limit.

(3) Know that your contract does not exceed a limit above which advertisement and acceptance of the lowest bidder is required or that proper advertising, awarding, etc., has been done.

(4) Know that assessments or taxes to pay for public improvement work which include your compensation are valid.

(5) Know that the board or official employing you do so in the proper legal method required by the act incorporating the body or by the charter or by the local rules governing such body.

(6) Know that funds are available or a specific appropriation made by the proper authorities to pay you before proceeding with your contract work.

(7) Have your contract in writing and know that it is worded properly.

(8) Have and put everything in writing and act only upon the strict wording of all contracts.

(9) In state work ascertain first if there is a state board or court of claims; if not you must depend on the official honesty and integrity of the official with whom you deal. Remember personal honesty and official honesty are contradications in some officials.

(10) Never consider or do any public work without first consulting competent legal advice.

While the above advice for the contractor will give him some knowledge of his position in a road contract, yet it does not protect him from the many abuses now possible under such contracts. Those must be corrected by honest, conscientious officials who will countenance only the same character of engin-

eers. Contracts and general specification conditions for road work must be drawn solely for that class of work and not copied slavishly from ancient documents used for buildings, etc. There must be no discrepancy between the contract clauses and the general conditions or other parts of the specifications. Unit prices for unit quantities of specified work with full details in the plans and specifications or cost plus percentage contracts for definite work with opportunities for honest, competitive bidding and awards to lowest bidders are essential. All unnecessary "satisfaction," "discretion," "warranty," "final and conclusive decision," "waiver of damages," "waiver of claims," "waiver of right of action," etc., clauses and other similar oppressive or "club" clauses for the official and engineer must be eliminated. They certainly are anything but a sanction for the expectation of good faith * * * in the mutual dealings of men of average right-mindedness. Lastly and most important the agreement between the parties must be made a real contract by giving the contractor the power to assert and prove his claims before a competent court or board.